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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1205

RAY FORD,

Petitioner,

v.

WISCONSIN REAL ESTATE
EXAMINING BOARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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Respondents pray that the petition for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled cause on October 9, 1970, be denied.

CORRECTION AND AMPLIFICATION OF THE STATEMENT OF FACTS

The record does not bear out appellant's contention at page 4 of his brief that it was upon the advice of his attorney that the Orth Agency did not include McMahon's instruction not to sell to black people in its listing contract with McMahon (R. 111).

The Orth Agency did not maintain a separate card file on listings on which notations regarding racial restrictions were kept at the time the McMahon property was listed with the Orth Agency (R. 118, 120, 356-58). The notation as to Ford's color was placed not on a card relating to the McMahon property, but on a card of the type filled out for all prospective purchasers (R. 120).

Earl Zarbock stated that he had not been employed by the Orth Agency since August of 1966, and that he had no idea of what the Orth Agency practices had been since he had left (R. 382, 386). He further testified that he never solicited any instructions from owners not to sell to colored and that it wasn't necessarily a policy of the Orth Agency to solicit such instructions (R. 383, 384). As to racial restrictions, Zarbock stated, the broker would go according to what the owner might instruct him to say, that is, what the owner wanted him to do (R. 378). Mr. Zarbock stated further that he never received any instructions from Bud Orth not to sell to a colored family in an area where there were as yet no black families (R. 379, 380).

Reasons for Denial of the Writ

1. The petitioner asks this Court to consider whether the State of Wisconsin, through its Supreme Court, its Real Estate Commission and its legislature, has engaged in conduct proscribed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Pet. 2)[1]

We submit that the decision of this Court in Jones v. Mayer Co., 392 U.S. 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), and Congressional enactment of 42 U.S.C. §§3601 et. req. make consideration of the merits in this case unnecessary and that to grant certiorari in such circumstances would be improvident.

The landmark decision in Jones vs. Mayer, supra, of course held that 42 U.S.C. §1982:

> "...bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." (p. 413)

The sweep of that language leaves no doubt, in our view, that private racial discrimination by a real estate broker would be proscribed. The Supreme Court of Wisconsin so indicated in its decision below. (Pet. App. p. 12a). At any rate, 42 U.S.C. 3603 (b) (1) now specifically prohibits such private discrimination by brokers.

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[1] The following abbreviations are used throughout this brief: Pet. - Petitioner's Brief; Pet. App. - Petitioner's Appendix.

Petitioner does not allege the existence of a statute which requires unjustified discrimination nor does he allege discriminating governmental administration of a statute fair on its face. Rather, throughout his brief petitioner repeatedly alleges the existence of a state action which has the effect of promoting or permitting private discrimination. However, with private discrimination itself now illegal in the sale or rental of property, state action of the type alleged here, which was formerly proscribed, is now in fact impossible. That is, state action which is said to promote or permit private discrimination by brokers in the sale or rental of housing is no longer possible because such private discrimination is now illegal under Federal law.

Because such state action is no longer possible, the previous value of the "state action" argument as a theory for the elimination of private discrimination in housing has become valueless. Indeed, much more powerful and satisfactory tools for the accomplishment of that end are now in existence. Just as in Jones v. Mayer, supra, future courts will not bother with the indirect and piecemeal state action theory where a violation of either 42 U.S.C. §1982 or 42 U.S.C. §§3601 et. seq. is evident.

For these reasons no issue of public importance can be said to have existed at the time petitioner filed his petition for certiorari in this Court. The words of Mr. Justice Harlan, dissenting in both Jones v. Mayer, supra, at p. 479 and Sullivan v. Little Huntington Park, 396 U.S. 229, at p. 250, 90 S. Ct. 232, 83 L. Ed. 2d 386 are particularly relevant here:

"This Court's certiorari jurisdiction should not be exercised simply 'for the benefit of the particular litigants,' Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955) but instead for the 'settlement of [issues] of importance to the public as distinguished from...the parties,' Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)."

2. It is true that this Court did exercise its certiorari jurisdiction in both Jones v. Mayer Co., supra, and Sullivan v. Little Huntington Park, supra, so as to grant those petitioners the relief they had sought below under §1982. In those cases the petitioners sought injunctive relief, damages, or both, for redress of acts of private discrimination practiced against them in the sale or rental of housing. The case at bar, however, contains no such compelling element. No damages or injunctive relief are sought here. Thus, what possible interests of the parties or the public would be served by a decision on the merits? The petitioner does not seek any relief here which would compensate him for discriminatory acts or ensure him the acquisition of the home he sought to purchase. Nor would a finding of state action provide him with such relief.

What must be obvious to all is that the petitioner is seeking to remove from the social milieu a type of private racial discrimination which has operated in urban areas to create a white wall around the ghetto. We have already shown that this wall has been breached by a new federal statute and by this Court's construction of an old one.

In view of these recent developments, great difficulties would be raised by a decision on the merits in this case. Petitioner's charges of "state

action" could then only be viewed upon the assumption that the states have a positive duty to provide remedies for or prohibitions against private racial discrimination in housing which exceed those given on the Federal level. Namely, the revocation of the license of a broker who has discriminated. There is no authority for such an assumption. To the contrary, the great weight of authority indicates that the states have no duty to legislate against private racial discrimination. The Fourteenth Amendment upon which petitioner relies is merely prohibitory. To be sure, as petitioner points out, there is some indication that inaction by a state which has the effect of promoting or permitting private discrimination may be considered state action proscribed by the Fourteenth Amendment. In our minds the allusion to "state neutrality" in Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), makes such authority unclear for the moment. However, petitioner's view of state action goes far beyond even the "neutrality" position. He would have this Court expand the "state action" theory in such a manner as to completely rewrite the Fourteenth Amendment. The obvious impact of such a decision in fields other than racial discrimination in the sale and rental of housing mitigate strongly against granting certiorari here.

3. Petitioner alleges that the Supreme Court of Wisconsin "failed to recognize an established Federal right and implicated the State in conduct proscribed by the Fourteenth Amendment and by 42 U.S.C. §1982." (Pet. 7). The fact is that the Wisconsin Supreme Court found a probable violation of §1982 (Pet. App. A p. 12a). Is the Wisconsin Supreme Court to blame because petitioner neglected to seek his remedy under §1982 against the broker? We think not. Furthermore, we see

nothing in Jones v. Mayer, supra, in §1982 itself, in the 1968 Fair Housing Act or in other decisions of this Court which conflicts with the decision of the Wisconsin Supreme Court. We know of no established Federal right the violation of which affords the remedy sought by the petitioner. In view of the Wisconsin Supreme Court's awareness of the existence and application of §1982, it cannot be said to have failed to recognize petitioner's established federal right. Petitioner's own expanded view of "state action" has led him to reason that the lower Court's failure to revoke the license or find authority for that purpose in Wis. Stat. 135.08 (2) is necessarily in conflict with a right under §1982, the Fourteenth Amendment, or the decisions of this Court. Yet petitioner expressly concedes, despite extensive citation of the "state action" cases, that there is no judicial authority in existence which creates a conflict with the decision of the Wisconsin Supreme Court in this case. We reiterate that the Fourteenth Amendment, §1982, the Fair Housing Act of 1968, or the decisions of this Court, do not impose any duty upon the states to create prohibitions or remedies in excess of those provided by existing federal law.

Sullivan v. Little Huntington Park, supra, relied upon at Pet. 15, does not stand for the proposition that state courts, administrative agencies or legislatures have a duty to provide the type of remedial action asked by the petitioner in this case. There it was held that damages and injunctive relief are available to redress violations of §1982. Petitioner seeks no such relief here nor has he at any time sought to gain redress directly from those who discriminated against him. Nor does Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 380 P. 2d 34, 40 (1962) at Pet. 17, 18 stand

for any such proposition. In fact, that Court, in striking down a portion of the Colorado Fair Housing law stated at p. 250:

> "The legislature cannot delegate to any administrative agency "carte blanche" authority to impose sanctions or penalties for violation of the substantive portion of a statute." (emphasis added)

We feel that such restrictions are applicable to state courts also where a court would, in effect, "create" a sanction or penalty not contemplated by a statute or the common law.

Petitioner relied below on Wis. Stat. sec. 101.60 to show he had been discriminated against by the broker, yet he failed to invoke that statute as a basis for relief. Instead, he sought to use sec. 101.60 as grounds for a claim that the broker's license should be revoked under Wis. Stat. sec. 136.08 (2). Chapter 136 of the Wisconsin Statutes nowhere mentions racial discrimination, while 101.60 (3) provides that the provisions of 101.60 shall be administered by the Department of Industry, Labor and Human Relations.

Instead of seeking relief under 101.60 before the Department of Industry, Labor and Human Relations, petitioner went to the Real Estate Commission. Now that the Real Estate Commission and the Supreme Court of Wisconsin have failed to find authority in Wis. Stat. §136.08 (2) to grant the relief he seeks, petitioner claims state action which is proscribed.

We submit that such a claim is not properly raised here. Petitioner has failed to seek the relief available to him in the proper forum below under §101.60 (2) (a) and (b) and §101.60 (7). Both 136.08 (2) and 101.60 (6) expressly provide only criminal sanctions so that the petitioner cannot be heard to say that remedies under 101.60 (6) are inadequate or that any possible remedy under 136.08 (2) is more appropriate. It has been held in other states that damages are available for the violation of state statutes, like §101.60, dealing with civil rights but which expressly provide only criminal sanctions. Amos v. Prom, Inc., 117 F. Supp. 615 (D.C. Iowa, 1954); Powell v. Utz, 87 F. Supp. 811 (D.C. Wash. 1949); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 214 N.W. 241 (1927); Ferguson v. Gies, 82 Mich. 358, 46 N.W. 718 (1890); Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955). Yet petitioner did not assert such a cause of action below. Thus, petitioner cannot raise the state action argument so as to force a remedy not contemplated by the statute relied upon by the common law.

Furthermore, the Wisconsin Supreme Court was fully aware that the result of its decision could not involve the State of Wisconsin in the sanctioning of continued private racial discrimination by real estate brokers because it was armed with the knowledge that Jones v. Mayer Co., supra, and 42 U.S.C. §§3601 et. seq. have made such a result impossible.

4. Because the Wisconsin Supreme Court clearly found the Real Estate Commission to be in error as to the actual existence of racial discrimination, the portion of the petitioner's argument dealing with the Commission's findings on that issue are clearly irrelevant. All that need be considered is what the Commission could have done had it found discrimination.

First of all, the petitioner does the Commission a grave disservice by its charge of naivete (Pet. 20). The Commission was indeed aware of this problem, and in 1965 it asked the Attorney General of Wisconsin for his advisory opinion on three questions: (1) Whether 136.08 (2) Wis. Stats. gave the Commission the power to revoke a broker's license for racial discrimination? (2) If not, could the Commission itself formulate such a rule? (3) If neither, would failure to revoke for racial discrimination constitute "state action" proscribed by the Fourteenth Amendment? The Attorney General answered all three questions in the negative. 54 Wis. Ops. Att'y. Gen. 31 (1965). The Commission was under this constraint when the instant case was presented to it. Under the circumstances the problem was obviously one for the courts or the legislature to decide. Thus, it is just as probable that the Commission acted in the manner it did to ensure judicial review of the case in hopes that the state courts would interpret the statute differently, than on any theory that it believed at the time that it had such authority as petitioner suggests (Pet. pp. 9, 20).

Secondly, it has already been shown generally why no useful purpose would be served by a decision on the merits in this case. To reiterate, the issue in this case has become one of isolated significance, the deciding of which would merely resolve a problem between the parties and which as to the public in general has already been settled. In addition, a finding for petitioner on the issues he has presented for consideration can in no way fulfill the expectations he had of purchasing the particular home he was denied, nor could he be given damages or in any other way be made whole by such a finding.

5. We feel that the arguments heretofore presented regarding mootness apply equally to the specific allegations which petitioner has advanced with regard to the Wisconsin legislature. For those reasons we do not feel that the Legislature is "vulnerable" as petitioner suggests (Pet. p. 23). The footnote of the Wisconsin Supreme Court there quoted does not indicate that the Court feels Wisconsin "vulnerable". It is merely a suggestion that as a matter of desirable social policy the Legislature may wish to bring the state law of Wisconsin into conformity with existing Federal law on the subject of private discrimination in the sale and rental of housing. There is no suggestion that Wisconsin need exceed the scope of Federal law by creating in the Real Estate Commission the power to revoke the license of a broker who discriminates.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that the petition should be denied.

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William F. Eich, a member of the bar of this court, does hereby certify that copies of the above entitled Brief in Opposition to Petition for a Writ of Certiorari were served on Theodore W. Harris, 1633 Racine Street, Racine, Wisconsin, Adrian P. Schoone, 220 Ninth Street, Racine, Wisconsin and Nathaniel R. Jones, 1790 Broadway, New York, New York 10019, by depositing the copies in the United States mails, prepaid, air mail special delivery, addressed to them, as set forth above, on March 3, 1971.

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